Supreme Court, U.S.
FILED

No. 95-1300 FEB 5 - 1996

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In The

Supreme Court of the United States

October Term, 1995

LLOYD V. CRAWFORD, III; EDIE CRAWFORD LLOYD; BARBARA CRAWFORD DAVIS,

Petitioners,

vs.

JACK A. ROANE; FRED T. GROGAN, JR.; and JERALD M. DUNCAN, Trustees of the Pediatric Allergy Group Employees Retirement Plan and Money Purchase Pension Plan; LOUIS D. HAMRIC, Executor of the Estate of Lloyd V. Crawford, Jr.; BEVERLIE P. CRAWFORD,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do Petitioners have standing as "Beneficiaries" under 29 U.S.C. §§ 1002(8) and 1132(a) due to their showing that the Plan Administrator affirmatively represented to a participant that they were indeed beneficiaries of the participants account?

2. Are regulations promulgated by the Department of the Treasury pursuant to express Congressional directive in 29 U.S.C. § 1055(c)(3) legislative rules which create substantive rights for participants and beneficiaries under Title 29?

3. Did the District Court err in relying on an IRS private letter ruling issued to another taxpayer in granting summary judgment to respondent Surviving Spouse?

LIST OF PARTIES

The parties to the proceedings are:

Petitioners: Lloyd V. Crawford, III;

Edie Crawford Lloyd;

Barbara Crawford Davis

Respondents: Jack A. Roane, Fred T. Grogan, Jr., and Jerald M. Duncan, Trustees of the Pediatric Allergy Group Money Purchase Pension Plan;

Louis D. Hamric, Executor of the Estate of Lloyd V. Crawford, Jr.;

Beverlie P. Crawford

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OPINIONS BELOW

The District Court originally dismissed this action brought by Lloyd V. Crawford III, Edie Crawford Lloyd, and Barbara Crawford Davis pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132, ruling the Petitioners lacked standing to challenge the Administrator's violation of the annuity rules applicable to pension plans. The Court further relied on IRS Private Letter Ruling 9008003 (November 13, 1989) in determining that one hundred percent (100%) of the Decedent's money purchase plan account balance was payable to respondent Beverlie Crawford.

Petitioners appealed the District Court's decision, and on May 11, 1995 the United States Court of Appeals for the Sixth Circuit affirmed the District Court's judgment, finding that Petitioners lacked standing because there was no claim that the Decedent was "somehow duped" into not naming Petitioners as beneficiaries under the plan. Further, the Court of Appeals opined that the Administrator's violation of the annuity rules contained in the Treasury Regulations does not constitute a violation of Title 29. A Petition for Rehearing was filed by Petitioners, which Petition was denied without opinion by the Court of Appeals on November 6, 1995.

STATEMENT OF JURISDICTION

The Court's jurisdiction to review the order of the United States Court of Appeals for the 6th Circuit affirming the District Court's dismissal of the action is invoked pursuant to 28 U.S.C. § 1254(1). This Petition for Writ of Certiorari is timely filed within ninety (90) days of the denial of the Petition for Rehearing, November 6, 1995, by February 2, 1996.

STATUTES AND REGULATIONS INVOLVED

29 U.S.C. § 1002(7) provides as follows:

> (7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(8) provides as follows:

> (8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

29 U.S.C. § 1055(c)(3)(A) provides in pertinent part that:

> (3)(A) Each plan shall provide to each participant within a reasonable period of time before the annuity starting date (and consistent with such regulations as the Secretary of the Treasury may prescribe) a written explanation of —
>
> (i) the terms and conditions of the qualified joint and survivor annuity,
>
> (ii) the participant's right to make, and

> the effect of, an election under paragraph (1) to waive the joint and survivor annuity form of benefit,
>
> (iii) the rights of the participant's spouse under paragraph (2), and
>
> (iv) the right to make, and the effect of, a revocation of an election under paragraph (1).

26 C.F.R. § 1.417(e)-1(b)(3) provides in pertinent part that:

> (3) Time of consent. A plan must provide participants with the written explanation of the QJSA required by Section 417(a)(3) no less than 30 days and no more than 90 days before the annuity starting date. Written consent of the participant and the participant's spouse to the distribution must be made not more than 90 days before the annuity starting date.

26 C.F.R. § 1.401(a)-20 (Q&A-10) provides in pertinent part that:

> Q-10: What is the relevance of the annuity starting date with respect to the survivor benefit requirements?
>
> A-10: **Relevance.** The annuity starting date is relevant to whether benefits are payable as either a QJSA or QPSA, or other selected optional form of benefit. If a participant is alive on the annuity starting

> date, the benefits must be payable as a QJSA. If the participant is not alive on the annuity starting date, the surviving spouse must receive a QPSA.

26 C.F.R. § 1.401(a)-20 (Q&A-20) provides in pertinent part that:

> Q-20: What preretirement survivor annuity benefits must a defined contribution plan subject to the survivor annuity requirements of sections 401(a)(11) and 417 provide?
>
> A-20: A defined contribution plan that is subject to the survivor annuity requirements of sections 401(a)(11) and 417 must provide a preretirement survivor annuity with a value which is not less than 50 percent of the nonforfeitable account balance of the participant as of the date of the participant's death.

26 U.S.C. § 6110(j)(3) provides that:

> (3) Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent.

STATEMENT OF THE CASE

A. Nature of the Case.

This case involves the proper disposition of the account balance in the Pediatric Allergy Group Money Purchase Pension Plan of Lloyd V. Crawford, Jr., who died on March 12, 1992.

B. Course of Proceedings.

Petitioners filed a Complaint for Declaratory Judgment pursuant to 29 U.S.C. § 1132(a) on November 30, 1992. Petitioners filed a Motion to Amend the Complaint on January 11, 1993. Motions for Summary Judgment were filed by Respondent Beverlie P. Crawford and Petitioners on April 23, 1993 and May 25, 1993, respectively.

C. Disposition in District Court.

The Court denied the Motion of Petitioners to Amend the Complaint on June 23, 1993. The Court issued an Order granting Respondent Beverlie Crawford's Summary Judgment Motion and denying Petitioners' Summary Judgment Motion on December 16, 1993.

D. Disposition in Court of Appeals.

Consequently, on January 14, 1994, Petitioners filed a Notice of Appeal of the District Court's ruling. On May 11, 1995, the Court of Appeals affirmed the District Court's opinion. Petitioners filed a Petition for Rehearing on May 25, 1995, which Petition was denied without opinion by the Court of Appeals on November 6, 1995.

STATEMENT OF FACTS

Lloyd V. Crawford, Jr. ("Decedent") was employed during his lifetime by Pediatric Allergy Group, a Tennessee professional corporation. He was a participant in the corporation's Money Purchase Pension Plan ("Plan").

On October 24, 1991, Decedent met with Respondent Louis Hamric. At such meeting, Hamric informed Decedent that he had drafted the Plan, and that it provided for a distribution of 50 percent of the Decedent's account balance to his surviving spouse, with the remainder of the account balance distributed to his children and/or estate. On December 23, 1991, Decedent executed his Last Will and Testament and Respondent Hamric served as attesting witness.

Respondent Hamric represents himself as Administrator and Trustee of the Plan on the government Form 5500. Hamric failed to deliver to Decedent and his spouse the explanation of benefits required by 29 U.S.C. § 1055(c)(3). He also serves as Executor of Decedent's estate.

Decedent began receiving pension benefits from the Plan on or about January 6, 1992. He died on March 13, 1992.

By letter of July 24, 1992, Respondent Hamric provided Petitioners with copies of the Plan for the first time. Contrary to his representations made on October 24, 1991, Hamric advised that the Plan's account balance was distributable in full to Decedent's surviving spouse.

Petitioners are the surviving children of the Decedent. They filed a declaratory judgment action pursuant to 29 U.S.C. § 1132(a) to have the court adjudge the proper disposition of Decedent's benefits under the Plan.

REASONS FOR GRANTING THE WRIT

SUMMARY

The decision below is in conflict with the decision of another United States Court of Appeals on the issue of standing to sue by beneficiaries under ERISA. Further, the case presents an important administrative law question of first impression that is unique to the ERISA legislation. This issue is whether rule-making authority specifically delegated to the Secretary of the Treasury by Congress under Title 29 creates substantive rights for participants and beneficiaries under ERISA.

Finally, the District Court granted summary judgment in favor of Respondent Beverlie Crawford on the authority of an IRS Private Letter Ruling issued to another taxpayer, which such reliance is specifically prohibited by Congress.

I.

PETITIONERS HAVE STANDING AS "BENEFICIARIES" UNDER 29 U.S.C. §§ 1002(8) AND 1132(a) DUE TO THEIR SHOWING THAT THE ADMINISTRATOR AFFIRMATIVELY REPRESENTED TO THE DECEDENT THAT THEY WERE INDEED BENEFICIARIES.

The Court of Appeals in this case expressly disagreed with a decision of the Ninth Circuit Court of Appeals in ruling that Petitioners had no standing to pursue a claim as beneficiaries under 29 U.S.C. § 1132(a). In *Cripps v. Life Insurance Company of North America*, 980 F.2d 1261 (9th Cir. 1992) the Court of Appeals concluded that a civil action may be brought by "someone who claims to be" a beneficiary. *Id.*, 980 F.2d at 1267. The Sixth Circuit disagreed, relying on this Court's opinion in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

The *Firestone* case involved an analysis of the statutory definition of "participant", and expressly did not consider the definition of "beneficiary". *Id.*, 101 U.S. at 116. Nevertheless, the Court of Appeals applied the reasoning of the *Firestone* case "because the operative language in Sections 1002(7) and (8) is identical."

The operative language in the definitions of "participant" and "beneficiary" is not identical. The operative word in Subsection (7) is "eligible"; the operative word in Subsection (8) is "entitled". Webster's Dictionary defines the verb "entitled" as "to furnish with proper grounds for seeking or claiming something". Webster's Ninth New Collegiate Dictionary, 416 (1988). On the other hand, the definition of "eligible" suggests a more certain status — "qualified to be chosen." Webster's Ninth New Collegiate Dictionary, 404 (1988) Had Congress intended that the definitions of "participant" and "beneficiary" be identical, it would have utilized the same language. The fact that the word "entitled" is utilized in the definition of "beneficiary" suggests the intent to create a broader definitional status.

Regardless of the Sixth Circuit's conflict with the Ninth Circuit over the definition of "beneficiary", Petitioners have satisfied the Court of Appeals' standard for judicial standing. Based upon the Sixth Circuit's ruling in *Swinney v. General Motors Corp.*, 46 F.3d 512, the Court determined that Petitioners must show that the Decedent was "somehow duped" into not naming petitioners as beneficiaries under the Plan. The petitioners showed that the Administrator affirmatively represented to the Decedent that the petitioners were indeed beneficiaries. The Court's determination that such standard had not been met is a departure from the accepted and usual course of judicial proceedings, and calls for the exercise of the Supreme Court's power of supervision.

II.

REGULATIONS PROMULGATED BY THE DEPARTMENT OF TREASURY PURSUANT TO AN EXPRESS CONGRESSIONAL DIRECTIVE IN 29 U.S.C. § 1055(c)(3) ARE LEGISLATIVE RULES WHICH CREATE SUBSTANTIVE RIGHTS FOR PARTICIPANTS AND BENEFICIARIES UNDER ERISA.

Violation of the survivor annuity and notice requirements contained in the Treasury Regulations promulgated under the Internal Revenue Code are by definition violations of the coordinate sections of Title 29. Congress has specifically directed in the parenthetical language of 29 U.S.C. § 1055(c)(3) that regulations thereunder shall be promulgated not by the Secretary of Labor, but, rather, by the Secretary of the Treasury. In addition to this specific delegation of authority, Congress in 1974 delegated general authority to the Department of Treasury to issue regulations applicable to some of the coordinate sections of ERISA and the Internal Revenue Code. 29 U.S.C. § 1202(c). The substantive provision at issue, (survivor annuities and the required participant notice thereof) is in the same category as the general delegation. ERISA Subchapter 1, Subtitle B, Parts 2 and 3. *See Guidry v. Sheet Metal Workers International Association,* 10 F.3d 700 at 709 (10th Cir. 1993).

In 1978, President Carter, pursuant to the Reorganization Act of 1977, 5 U.S.C. §§ 901-912, issued Reorganization Plan No. 4, Section 101, transferring the authority of the Department of Labor to issue regulations with respect to survivor annuities to the Department of Treasury. Accordingly, on three (3) separate occasions, Congress has delegated interpretive authority under Title 29 to the Secretary of Treasury, rather than the Secretary of Labor.

The Treasury Regulations promulgated pursuant to this delegation are 26 C.F.R. §§ 1.401(a)-20 and 1.417(e)-1. At both the District Court level and the Court of Appeals, the Petitioners have explained how these regulations reinforce the interpretation that only fifty percent (50%) of Decedent's account balance in the Plan is payable to surviving spouse. As these regulations were promulgated pursuant to an express directive from Congress in Title 29, and violations thereof also constitute violations of Title 29.

The "annuity starting date" is relevant to whether benefits are payable as either a Qualified Joint and Survivor Annuity ("QJSA") or Qualified Preretirement Survivor Annuity ("QPSA"). If the participant is not alive on the annuity starting date, the surviving spouse must receive a QPSA. If a participant is alive on the annuity starting date, the benefits must be payable as a QJSA. 26 C.F.R. § 1.401(a)-20 (Q&A-10).

An explanation of the QJSA must be given no earlier than ninety (90), and no later than thirty (30) days prior to the annuity starting date. 26 C.F.R. § 1.417(e)-1(b)(3). Satisfaction of this requirement is a prerequisite to the occurrence of the annuity starting date. Death of a plan participant prior to the annuity starting date necessarily requires that survivor benefits be paid in the form of a QPSA. 26 C.F.R. § 1.401(a)-20(Q&A-10).

The significant difference between a QJSA and a QPSA is that the former requires that one hundred percent (100%) of a participant's benefit be paid to the surviving spouse, while the latter provides that only fifty percent (50%) of a participant's benefit be paid to a surviving spouse. 26 C.F.R. § 1.401(a)-20(Q&A-20). The remaining fifty percent (50%) balance of a participant's interest in the plan is not subject to the annuity rules, and may be paid to a non-spouse beneficiary.

III.

THE SUMMARY PLAN DESCRIPTION CONTROLS OVER INCONSISTENT PLAN PROVISIONS.

Congress has directed that the Summary Plan Description ("SPD") be written in a manner calculated to be understood by the average participant and to apprise participants and beneficiaries of their rights and obligations under the plan. 29 U.S.C. Section 1022. The Court of Appeals has recognized that a substantial line of case law exists that hold an SPD controlling when it conflicts with the plan itself. "The comprehensible terms of the SPD take precedence over the incomprehensible, technical terms of the plan itself." *Flacche v. Sun Life Assurance Company of Canada*, 958 F.2d 730, at 736 (6th Cir. 1992).

In the present case, Section 12 of the Plan's SPD provides in part as follows:

> ERISA requires certain types of retirement plans to provide married participants an opportunity to receive death benefits under the plan in the form of a survivor annuity. A survivor annuity means the surviving spouse would receive an annuity for life in an amount equal to 50% of the life annuity the participant would have received had he commenced to receive his plan benefits in the form of a life annuity the day before he died. For example, if a participant would have received a monthly pension of $400 at the time of his death, his surviving spouse would receive a monthly pension of $200 upon the participant's death for the remainder of her life under the survivor annuity option.

> To provide the survivor annuity, the Trustee would purchase with fifty percent (50%) of your account balance that type of annuity contract from a major insurance company. The exact monthly annuity payable to your surviving spouse would depend upon the amount of your account balance, the portion of the account balance of which she is the beneficiary and the insurance company's annuity rates at the time of the purchase. If ERISA requires this Plan to provide a survivor annuity option, when death benefits become payable, the committee will provide you an appropriate form to elect to have the Plan pay death benefits in the form of a survivor annuity, or to elect not to have the Plan pay death benefits in that form. The form the Committee will provide you will explain the economic effect of taking death benefits in the form of a survivor annuity. Your spouse must consent in writing to any election not to have death benefits paid in the form of a survivor annuity, if, in fact, the Plan must provide for a survivor annuity death benefit.

This language establishes that the plan incorporates the minimum requirements of the law, that the surviving spouse of the decedent receive an annuity having a value of no less than fifty percent (50%) of the participant's nonforfeitable account balance under the plan, determined at date of death. The remainder of the account balance is not subject to the annuity rules, and can be paid to someone other than the surviving spouse.

The lower courts have failed to address or reconcile this inconsistency between the Plan and SPD.

IV.

THE DISTRICT ERRED IN RELYING ON AN IRS PRIVATE LETTER RULING ISSUED TO ANOTHER TAXPAYER IN GRANTING SUMMARY JUDGMENT TO RESPONDENT'S SURVIVING SPOUSE.

Instead of addressing the inconsistency between the Plan and SPD, the District Court relied on IRS Private Letter Ruling 9008003 (November 13, 1989). However, Congress has directed that Private Letter Rulings may not be used or cited as precedent. 26 U.S.C. § 6110(j)(3). The rationale for this rule is evident under the facts of this case, where operational defects and inconsistencies between the Plan and Summary Plan Description result in fifty percent (50%) of the Decedent's account balance lacking an effective disposition.

The circumstances of the execution of Decedent's Will are especially probative. It was witnessed by Plan Administrator/ Trustee/Executor Louis D. Hamric on December 23, 1991. Given his role as Plan Administrator, Mr. Hamric was primarily responsible for providing the QJSA notice and calculation of benefits in the form of a QJSA. With full knowledge of these operational defects and the contents of Decedent's Will, he knowingly and voluntarily witnessed the same. As a Plan representative, his witness of Decedent's Will establishes that it is a valid beneficiary designation of fifty percent (50%) of Decedent's account balance under the Plan.

CONCLUSION

Petitioners have standing as "beneficiaries" to pursue a claim for benefits under 29 U.S.C. § 1132(a) because the Plan administrator affirmatively represented to the Decedent prior to his death that the Petitioners were indeed beneficiaries. The failure of the Plan administrator to provide the QJSA notice to Decedent establishes that the "annuity starting date" did not occur until after his death. As a result, benefits are properly paid in the form of a QPSA (*see* 26 C.F.R. § 1.401(a)-20 Q&A-10). Section 12 of the Plan's Summary Plan Description establishes that only 50 percent (50%) of the Decedent's account balance is payable to his surviving spouse. The remainder of the account balance is not subject to the annuity rules, and is payable to Decedent's estate.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED NOVEMBER 6, 1995

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No.: 94-5192

LLOYD V. CRAWFORD, III; EDIE CRAWFORD LLOYD; BARBARA CRAWFORD DAVIS

Plaintiffs-Appellants

v.

JACK A. ROANE;

Defendant

BEVERLIE P. CRAWFORD

Defendant-Appellee

BEFORE: MERRITT, Chief Judge; SILER, Chief Judge; EDMUNDS, District Judge*

Upon consideration of the petition for rehearing filed by the defendant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

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* The Honorable Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation

Appendix A

ENTERED BY ORDER OF THE COURT

s/ Leonard Green, jr
Leonard Green, Clerk

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MAY 11, 1995

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1995 FED App. 0144 (6th Cir.)
File Name: 9Ba0144p.06

No. 94-5192

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LLOYD V. CRAWFORD, III, et al.,

Plaintiffs-Appellants,

v.

JACK A. ROANE, et al.,

Defendants-Appellees.

ON APPEAL from the United States District Court for the Western District of Tennessee

Decided and Filed May 11, 1995

Before: MERRITT Chief Judge; SILER, Circuit Judge; EDMUNDS, District Judge.*

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* The Honorable Nancy G. Edmunds, United Ststes District Judge for the Eastern District of Michigan, sitting by designation.

Appendix B

NANCY G. EDMUNDS, District Judge. The children of Dr. Lloyd Crawford, Jr., appeal the district court's judgment that they are not entitled to proceeds from their father's Money Purchase Pension Plan ("the Plan"). The district court held that the children do not have standing as beneficiaries to bring an action for benefits under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132. For the following reasons, we affirm the decision of the district court.

I

Dr. Crawford was a physician with the Pediatric Allergy Group until his retirement on or about December 31, 1991. As an employee of the Group, he participated in the Group's Plan. Dr. Crawford never designated a beneficiary to receive his Plan benefits nor executed a waiver of the survivor annuity. Dr. Crawford began receiving pension benefits from the Plan on or about January 6, 1992. He did not receive the full amount of his benefits from the Plan because of his death on or about March 13, 1992. He is survived by his widow, Beverlie Crawford, and his three children. The Trustees and Administrator of the Plan (collectively "the Trustees") determined that the children were not beneficiaries of the Plan, and distributed all Plan benefits to Mrs. Crawford.

The children filed a declaratory judgment complaint against Mrs. Crawford and the Trustees of the Plan in state court seeking to have the court adjudge them the beneficiaries of their father's Plan. Defendants removed the case to the United States District Court for the Western District of Tennessee on the basis that the complaint involved federal questions under ERISA, 29 U.S.C. § 1144. The children filed a motion for leave to amend complaint, which the district court

denied. Defendant Mrs. Crawford filed a motion for summary judgment, and the children subsequently filed a motion for summary judgment. The district court entered an "Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendants' Motion for Summary Judgment,"[1] ordering that all proceeds from the Plan are properly payable to Mrs. Crawford, as Dr. Crawford's surviving spouse.

The children filed a Notice of Appeal, stating that they appeal "the judgment denying Plaintiffs' Motion for Summary Judgment and granting Defendant Beverlie P. Crawford's Motion for Summary Judgment." In their appellate brief, served on counsel for the Trustees as well as counsel for Mrs. Crawford, the children appeal the district court's denial of their motion for leave to amend. Mrs. Crawford is the only Defendant to file a brief in this appeal.

II

Before turning to the merits of the case, we must first determine over which parties and claims we have appellate jurisdiction. Mrs. Crawford argues that this Court does not have appellate jurisdiction over the Trustees, and that this Court does not have jurisdiction to determine whether the district court should have denied the children's motion for leave to amend their complaint. We disagree.

Mrs. Crawford first argues that this Court does not have

---

1. Although the district court's order was titled "Order . . . Granting Defendants' Motion for Summary Judgment," and dismissed the case in favor of Defendants, Beverlie Crawford was the only Defendant to file a summary judgment motion.

jurisdiction over the Trustees because the children did not name them as appellees on the notice of appeal. This argument has no merit. Federal Rule of Appellate Procedure 3(c), only requires that the notice of appeal "specify the party of parties taking appeal," and does not require an appellant to name appellees. Fed. R. App. P. 3(c); *Intern. Union, UAW v. United Screw & Bolt Co.*, 941 F.2d 466, 471 (6th Cir. 1991).

Mrs. Crawford next argues that this Court does not have jurisdiction over the Trustees because the children have not appealed the district court's order denying their motion for leave to amend complaint. "Ordinarily, appeal from a final judgment draws into question all prior non-final rulings and orders." *United Screw*, 941 F.2d at 471. If an appellant, however, chooses to designate specific determinations in its notice of appeal, only those determinations may be raised on appeal. *Id.* Nevertheless, we considered and rejected a contention similar to Mrs. Crawford's in *Caldwell v. Moore*, 968 F.2d 595, 598 (6th Cir. 1992), and do so here. The children filed a notice of appeal stating that they appeal "the judgment denying Plaintiffs' Motion for Summary Judgment and granting Defendant Beverlie P. Crawford's Motion for Summary Judgment," but their appellate brief, which they served on counsel for the Trustees, discusses the Trustees' failure to furnish information and makes clear that the children also seek review of the district court's denial of their motion for leave to file an amended complaint. Therefore, the Trustees were on notice that the children seek appellate review of the motion for leave to amend their complaint and suffer no prejudice as a result of the children's failure to specify that they desire appellate review of the motion for leave to amend.

Appendix B

III

The children seek to bring two claims in this action. First, the children claim that they are entitled to benefits of their father's Plan under ERISA's civil enforcement provision, 29 U.S.C. § 1132(a)(1). Second, the children request that the Court order the Trustees to pay a penalty to the children for the Trustees' failure to provide plan information. 29 U.S.C. § 1132(c). The district court granted summary judgment in favor of the Defendants on the children's first claim, and refused to allow the children to amend their complaint to bring their second claim. Because the children do not have standing to bring either claim, we agree with the judgment of the district court.

We review a district court's grant of summary judgment pursuant to Fed. R. Civ. P. 56(c) de novo, using the same test utilized by the district court. *Moore v. Philip Morris Companies, Inc.*, 8 F.3d 335, 339 (6th Cir. 1993). In considering a motion for summary judgment, a district court may grant the motion only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

While the district court must view the allegations of the complaint in the light most favorable to the non-moving party, *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983),

cert. denied, 469 U.S. 826 (1984), there must be sufficient evidence upon which a jury could reasonably find for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue' for trial." *Street v. J. C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989) (citing *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

We review the district court's denial of a motion for leave to amend a complaint under an abuse of discretion standard. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend shall be freely granted when justice so requires. A motion to amend a complaint should be denied if the amendment is brought in bad faith, for dilatory purposes, results in undue delay or prejudice to the opposing party, or would be futile. *Foman v. Davis*, 371 U.S. 187 (1962); *Marx v. Centran*, 747 F.2d 1536, 1550 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985).

Standing is essential to the exercise of jurisdiction and is a "threshold question . . . [that] determin[es] the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Under ERISA's civil enforcement provision, 29 U.S.C. § 1132(a), a civil action may be brought "by a participant or beneficiary . . . to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, . . . to clarify his rights to future benefits under the terms of the plan" or for relief under subsection (c) of § 1132. 29 U.S.C. § 1132(a)(1). 29 U.S.C. § 1132(c) provides as follows:

Appendix B

> Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary . . . within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

Other subsections of § 1132 provide that the Secretary of Labor or a fiduciary of a plan may also bring a civil enforcement suit under ERISA. 29 U.S.C. §§ 1132(a)(2), (3) and (4). Therefore, the children have standing to bring their claims only if they are participants, beneficiaries, or fiduciaries.[2]

The children argue that they are "beneficiaries" with ERISA standing essentially because they claim to be beneficiaries. They argue that any person who claims he is a beneficiary is a "beneficiary" with the power to bring a civil enforcement action under ERISA. This argument has no merit. Congress gave "beneficiary" a defined meaning under ERISA. ERISA defines a " beneficiary " as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8). This Court has not had the occasion to determine

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2. The children do not purport to have standing on any ground other than as beneficiaries.

exactly when a plaintiff is a "beneficiary" under § 1002(8). Based on the language of § 1002(8) and the United States Supreme Court's and this Court's test for when a plaintiff is a "participant" under 29 U.S.C. § 1002(7), we hold that one is a "beneficiary" under § 1002(8) only if he has a reasonable or colorable claim for benefits under an ERISA plan, and that the children have not made this showing.

The test used by the United States Supreme Court and this Court in determining who is a "participant" under § 1002(7) counsels against adopting the children's suggested "claim to be a beneficiary" test for determining who is a "beneficiary" under § 1002(8). In *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 117-18 (1989), the Court reversed the Third Circuit Court of Appeals which had held that § 1132(a)(1) should be read to mean that "a civil action may be brought by *someone who claims* to be a participant or beneficiary" (emphasis in original). The Supreme Court reasoned that " [t]o say that a 'participant' is any person who claims to be one begs the question of who is a 'participant' and renders the definition set forth in § 1002(7) superfluous." *Id.* The Court held that "participants" are "either employees in, or reasonably expected to be in, currently covered employment, or former employees who have a reasonable expectation of returning to covered employment or who have a colorable claim to vested benefits." *Id.* (citations omitted). "In order to establish that he or she 'may become eligible' for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.* This Court followed *Firestone*'s reasoning in *Teagardener v. Republic-Franklin Inc. Pension Plan*, 909 F.2d 947, 951-52 (6th Cir. 1990), *cert. denied*, 498 U.S. 1027 (1992).

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Although the Court's analysis concerned the definition of "participant" under § 1002(7), the analysis applies to the definition of "beneficiary" under § 1002(8) with equal force because the operative language in §§ 1002(7) and (8) is identical. Section 1002(7) defines "participant" as any "employee or former employee . . . *who is or may become* eligible to receive . . . employee benefit[s]" (emphasis added). Section 1002(8) defines "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, *who is or may become* entitled to a benefit thereunder" (emphasis added). Therefore, based on the statutory language, a "beneficiary" is not anyone who claims to be one. Rather, a "beneficiary" under § 1002(8) is one who has a reasonable or colorable claim to benefits.[3]

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3. The children rely on cases from the Ninth, Third, and Fourth Circuit Courts of Appeals to support the proposition that one is a "beneficiary" with ERISA standing if he merely claims to be a beneficiary. *Cripps v. Life Insurance Co. of North America*, 980 F.2d 1261, 1266-67 (9th Cir. 1992); *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 152 (3d Cir. 1987), *rev'd in part*, 489 U.S. 101 (1989); *Salomon v. Transamerica Occidental Life Ins. Co.*, 801 F.2d 659 (4th Cir. 1986). We are unpersuaded.

First, the Supreme Court reversed in part the Third Circuit's decision in *Firestone*. The children contend that the Supreme Court reversed a section of the court of appeals decision not applicable to this case. The children's contention is without merit. In *Firestone*, 489 U.S. at 117-18, the Supreme Court upheld the section of the court of appeals' decision concerning the standard of review of an employer/fiduciary's denial of ERISA benefits to a plan participant or beneficiary, but reversed the court of appeals' decision concerning the test for "participant" under § 1002(7). The Supreme Court's decision in *Firestone* overruled the Fourth Circuit's 1986 *Salomon* decision because the Fourth Circuit employed the same reasoning as the Third Circuit in *Firestone*.

Further, we disagree with the Ninth Circuit's 1992 decision in *Cripps*, 980

(Cont'd)

Therefore, in this Circuit, one is a "beneficiary" with ERISA standing if he has a reasonable or colorable claim to benefits under an ERISA plan. The language of the Plan compels the conclusion that the children do not have a reasonable claim for benefits of their father's Plan and are therefore not proper parties to request adjudication of the issues whether the Trustees wrongly distributed benefits to Mrs. Crawford and whether the Trustees failed to furnish Plan information to participants or beneficiaries. Section 12 of the Plan, titled "Payment of Benefits upon Death," provides as follows:

> If you die prior to receiving all of your benefits under the Plan, the Trustee will pay the balance of your account to your beneficiary. Unless your beneficiary is a designated beneficiary, the Trustee must completely distribute your benefits within 5 years of the date of your death. A designated beneficiary is an individual designated by you as your beneficiary. In general, a spouse of a married participant must consent to any beneficiary designation which does not name the spouse as a sole beneficiary of the participant's death benefit.

(Cont'd)
F.2d at 1266-67, where the court relied on the court of appeals decisions in *Firestone* and *Salomon* to hold that "as a practical matter . . . courts normally read § [1132(a)] as if it read; 'a civil action may be brought by *someone who claims to be* a participant or beneficiary' " (emphasis in original) (citations omitted). The court noted that *Firestone* had been "reversed in part on other grounds." We do not read *Firestone* that way; rather, it seems clear to this Court that the Supreme Court in *Firestone* reversed the Third Circuit's decision concerning ERISA standing.

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This provision complies with the Retirement Equity Act of 1984 ("REACT"), which, among other things, amended ERISA by requiring plans to provide that the surviving spouse of a participant is to receive the benefits under the plan following the death of the participant, unless such benefits are specifically waived by the surviving spouse in a manner prescribed by law, i.e., the spouse's written consent. 29 U.S.C. § 1055(c)(2)(A)(i); *Moore v. Philip Morris Companies, Inc.*, 8 F.3d 335, 338 (6th Cir. 1993). It is undisputed that Dr. Crawford did not designate a beneficiary and that Mrs. Crawford did not consent to a beneficiary other than her to be named as a beneficiary. Therefore, the children do not have a reasonable or colorable claim for their father's Plan benefits and thus are not "beneficiaries" under § 1002(8).

Plaintiffs' status as children of a participant in an ERISA plan does not provide them with standing as "beneficiaries." In *Coleman v. Champion Intern./Champion Forest Prod.*, 992 F.2d 530, 533-34 (5th Cir. 1993), the court held that a pension plan participant's son was not a "beneficiary" of the plan with standing to sue under ERISA because the participant never designated the son to receive benefits under the plan. *See also Keys v. Eastman Kodak Co.*, 739 F. Supp. 135, 137-38 (W.D. N.Y.), *aff'd*, 923 F.2d 844 (2d Cir. 1990); *Lerra v. Monsanto Co.*, 521 F. Supp. 1257, 1263 (D. Mass. 1981). In all three cases, as in the present case, the court rejected the plaintiff's claim to be a beneficiary because the plaintiff had not been designated a beneficiary, despite the fact that the plaintiff was either a child or spouse of the plan participant.

The exception to the definition of "participant" for standing purposes found in *Swinney v. General Motors Corp.*, 46 F.3d 512, 518 (6th Cir. 1995), *Astor v. International*

Business Mach. Corp., 7 F.3d 533, 538-39 (6th Cir. 1993) (internal citation omitted), and *Drennan v. General Motors Corp.*, 977 F.2d 246, 250 (6th Cir. 1992), *cert. denied*, __U.S. __, 113 S. Ct. 2416 (1993), is inapplicable to this case. Noting that the Supreme Court developed its definition of "participant" outside the standing context, *see Drennan*, 977 F.2d at 250, and that "in determining who is a 'participant' for purposes of standing, the definition found in 29 U.S.C. § 1002(7) must be read in the context of traditional concepts of standing, not in the context of adjudicating the ultimate issue of the merits of the plaintiffs' claim. . . ." *Astor*, 7 F.3d at 538, we developed in those cases an exception to the general rule that a person who terminates his right to belong to a plan cannot be a "participant" in the plan. Specifically, "if the employer's breach of duty causes the employee to either give up his right to benefits or to fail to participate in a plan, then the employee has standing to challenge that fiduciary breach," despite the fact that the employee is technically not a "participant." *Swinney*, 46 F.3d at 518. "Otherwise, a fiduciary could defeat an employees standing to bring an ERISA action by duping him into giving up his right to participate in the plan." *Id.*

This exception does not apply here, where there is no claim that the Trustees or Mrs. Crawford somehow duped Dr. Crawford into not naming his children as beneficiaries under the Plan. Indeed, the children had no right to benefits in the first place under the Retirement Equity Act, which provides that the surviving spouse of a participant is to receive the benefits under an ERISA plan following the death of the participant, unless such benefits are specifically waived by the spouse. 29 U.S.C. § 1055(c)(2)(A)(i). We decline to create an exception to the general rule that a person does not have

standing as a "beneficiary" if he does not have a reasonable or colorable claim to benefits.

Based on the foregoing, the district court did not err in holding that Mrs. Crawford and the Trustees are entitled to judgment as a matter of law on the children's claim for benefits, and did not abuse its discretion in refusing to allow the children to amend their complaint to include a claim for failure to provide information because such a claim would be futile.

IV

Even if the children have standing to bring this suit, the district court did not err in dismissing this case. The children argue that the Plan should be disqualified for tax-deferred treatment because the Trustees failed to provide written explanations of the Plan and because the Trustees provided Mrs. Crawford with a Qualified Joint and Survivor Annuity ("QJSA") rather than a Qualified Pre-retirement Survivor Annuity ("QPSA"). The children argue that the district court should have avoided the disqualification by characterizing the Plan benefits as a QPSA, so that Mrs. Crawford would receive 50 percent of the account balance, and the remaining 50 percent would pass to the children through the residuary clause in Dr. Crawford's will.

Neither the district court nor this Court, however, has the power to resolve a disqualification issue concerning an ERISA plan in a § 1132 action. Section 1132 provides that beneficiaries may bring only five actions: to recover benefits, § 1132(a)(1)(A); for a penalty for an administrator's failure or refusal to comply with a request for information,

§§ 1132(a)(1)(B), (a)(4); for breach of fiduciary duty, § 1132(a)(2); and to enjoin any act which violates the terms of a plan or the ERISA provisions contained in Title 29 of the United States Code, § 1132(a)(3). The children have not asserted that the distribution of Plan benefits violates Title 29. Further, 26 U.S.C. § 7476 provides that the United States Tax Court has jurisdiction to determine whether a retirement plan is qualified for tax-deferred treatment. Section 7476 further provides that only an employer, plan administrator, certain employees, and the Pension Benefit Guaranty Corporation may file pleadings in the Tax Court concerning the tax-deferred status of a plan. 26 U.S.C. § 7476(b)(1).

Moreover, the favorable tax consequences of ERISA plans are not mandatory and cannot be guaranteed by judicial intervention. *Hollingshead v. Burford Equipment Co.*, 747 F. Supp. 1421, 1436 (M.D. Ala. 1990). "ERISA contains no express provision that requires an employer to qualify a pension plan under the Internal Revenue Code. Instead, the tax consequences of not qualifying are so severe that practical considerations generally force employers to qualify their plans." *Id.* at 1434

Finally, even if this Court would determine that the Plan is disqualified for tax-deferred treatment, the written terms of the Plan would continue to be effective as a written contract between the participant, his beneficiary, and the Plan sponsor so that the beneficiary designation provided in the Plan would control. The children contend that the Plan terms do not control here because they are inconsistent with the summary plan description ("SPD"). This is irrelevant if Plan disqualification cannot change the terms of the Plan. Further, the children have not pointed to any specific provision of the

SPD that is inconsistent with the Plan terms. Moreover, violation of ERISA reporting and disclosure requirements, 29 U.S.C. § 1132(c), does not entitle the children to a substantive remedy. *Lewandowski v. Occidental Chemical Corp.*, 986 F.2d 1006 (6th Cir. 1993).

V

Accordingly, we **AFFIRM** the judgment of the district court.

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MAY 11, 1995

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No: 94-5192

LLOYD V. CRAWFORD, III, et al.,

Plaintiffs-Appellants,

v.

JACK A. ROANE, et al.,

Defendants-Appellees.

Before: **Merritt**, Chief Judge; **Siler**, Circuit Judge; **Edmunds**, U.S. District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Western District of Tennessee at Memphis.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

Appendix C

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

A True Copy.

Attest:

s/ Diane Schnur
Deputy Clerk

Issued as Mandate: 11/14/95

COSTS: No Costs

Filing Fee .... $
Printing .... $

Total .... $

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION DATED DECEMBER 16, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 92-3050 4Bro

LLOYD V. CRAWFORD, III, EDIE CRAWFORD LLOYD, and BARBARA CRAWFORD DAVIS,

Plaintiffs,

vs.

JACK A. ROANE, FRED T. GROGAN, JR., and JERALD M. DUNCAN, Trustees of the Pediatric Allergy Group Employees Retirement Plan and Money Purchase Pension Plan, LOUIS D. HAMRIC, Executor of the Estate of Lloyd V. Crawford, Jr., and BEVERLIE P. CRAWFORD,

Defendants.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to consideration before the Court on motions for summary judgment. The issues have been considered and a decision has been rendered in accordance with the Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Motion for Summary Judgment filed on December 16, 1993.

Appendix D

IT IS ORDERED AND ADJUDGED that the motions and record in this case show that all proceeds from decedent's Retirement Plan and Money Purchase Pension Plan are properly payable by Plan Trustees to defendant Beverlie P. Crawford, as decedent's surviving spouse.

APPROVED:

s/ Robert M. McRae
ROBERT M. McRAE
SENIOR UNITED STATES DISTRICT JUDGE

September 16, 1993
Date

s/ Robert R. Di Triolio
Clerk

s/ V. La Fon
(By) Deputy Clerk

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION DATED DECEMBER 15, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 92-3050 4Bro

LLOYD V. CRAWFORD, III, EDIE CRAWFORD LLOYD, and BARBARA CRAWFORD DAVIS,

Plaintiffs,

vs.

JACK A. ROANE, FRED T. GROGAN, JR., and JERALD M. DUNCAN, Trustees of the Pediatric Allergy Group Employees Retirement Plan and Money Purchase Pension Plan, LOUIS D. HAMRIC, Executor of the Estate of Lloyd V. Crawford, Jr., and BEVERLIE P. CRAWFORD,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This is an ERISA action for clarification pursuant to 29 U.S.C. § 1132(a)(1)(B). In the Complaint, plaintiffs seek a declaratory judgment declaring them to be beneficiaries of their deceased father's ("the decedent") Retirement Plan and Money Purchase Pension Plan. Now before the Court are

plaintiffs' motion for summary judgment and defendants' motion for summary judgment.

FACTS

The decedent, Lloyd V. Crawford, Jr., was a physician with the Pediatric Allergy Group. As an employee of the Group, decedent participated in the Pediatric Allergy Group Employees' Retirement Plan ("the Retirement Plan") and Money Purchase Pension Plan ("the MPP Plan") which fall under the auspices of ERISA.

The decedent retired on or about December 31, 1991, and began receiving pension benefits from the Retirement Plan and the MPP Plan (collectively referred to as "the Plans") on or about January 6, 1992. Because of decedent's death on March 13, 1992, he did not receive the full amount of his benefits from the Plans. The decedent did not designate a beneficiary to receive his benefits upon his death.

On July 30, 1992, plaintiffs, who are decedent's surviving children, contacted the administrator of decedent's estate, defendant Louis D. Hamric, to take issue with Mr. Hamric's advice to the Trustees of the Plans that 100% of the benefits flowing from decedent's participation in the Plans were payable to decedent's widow, defendant Beverlie P. Crawford. Mr. Hamric took this communication to be a petition for benefits and submitted such to the administrators of the Plans, defendants Roane, Grogan and Duncan.

Shortly thereafter, the defendant administrators met and determined that plaintiffs were not beneficiaries of the Plans. On November 30, 1992, plaintiffs filed a complaint for

declaratory judgment in Chancery Court of Tennessee, alleging that certain provisions of the Plans were subject to varying interpretations. Defendants jointly removed the action to this Court on December 22, 1992.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

In their motion for summary judgment, plaintiffs first allege that the MPP Plan is currently disqualified for tax-deferred treatment. Plaintiffs then argue that the Court can and should adopt their "cure" proposal which would avoid the alleged disqualification and result in fifty percent of the decedent's account balance under the MPP Plan going to plaintiffs through the residuary clause of decedent's will. Specifically, plaintiffs allege that the MPP Plan is disqualified due to both the Trustees' failure to provide written explanations required by IRC § 417(a)(3) and provide for payment of benefits in the form of a Qualified Joint and Survivor Annuity pursuant to IRC § 401(a)(11). In order to "cure" the disqualification, plaintiffs assert that the benefit payable to decedent's surviving spouse should be characterized as a Qualified Pre-retirement Survivor Annuity, in which fifty percent of decedent's account balance would be payable to the surviving spouse over her life expectancy. The remaining fifty percent would be payable to the executor of decedent's estate, pursuant to the residuary clause of decedent's will, in which the plaintiffs have interest.

Whether the MPP Plan is disqualified for tax-deferred treatment is not a matter properly before this Court. As defendants point out, plaintiffs do not have standing to argue that the MPP Plan should be disqualified. Plaintiffs are not Plan participants. Additionally, 29 U.S.C. § 1132, under which

this action was brought, does not include an action by beneficiary to disqualify a plan. Further, under these circumstances, the determination of disqualification of the Plan is properly within the purview of the Internal Revenue Service or the U.S. Tax Court. *See* IRC § 7476.

Moreover, the "cure" plaintiffs propose requires the Court to ignore the Internal Revenue Code and the facts of this case. Plaintiffs' proposed "cure" requires the Court to "characterize" the MPP Plan's "annuity starting date" as being subsequent to the decedent's death so as to make the benefits payable in the form of a Qualified Pre-retirement Survivor Annuity.

IRC § 417(a)(f)(2), in pertinent part, provides that the "annuity starting date" is the first day of the first period for which an amount is payable as an annuity. The decedent began receiving benefits from the plans on or about January 6, 1992. Moving the "annuity starting date" over three months to a date after the decedent's death on March 13, 1992, would ignore the statute, the Plan and the fact that the decedent had already begun receiving benefits under the Plan.

Even if the MPP Plan were disqualified for tax-deferred treatment, the written terms of the Plan would continue to be effective as a contract between the participant, his beneficiary and the Plan sponsor. Consequently, the beneficiary designation provided for in the Plan is controlling.

For all of the above reasons, plaintiffs' motion for summary judgment is denied.

Appendix E

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants move for summary judgment asserting that defendant Beverlie P. Crawford, decedent's surviving spouse, is the sole beneficiary under the Plans. As defendants assert, both the MPP Plan and the Retirement Plan require the payment of the decedent's benefits to his surviving spouse. Article IX, Paragraph 4, of the MPP Plan, as required by 26 U.S.C. § 401(a)(11), provides for the automatic payment of a survivor annuity to the surviving spouse unless a waiver has been signed by the Participant and the spouse. No such waiver was executed.

The Retirement Plan was drafted in accordance with the exception to the survivor annuity rules of 26 U.S.C. § 401(a)(11)(B)(iii) and, under Article IX, Paragraph 2, requires the spouse to be the automatic beneficiary of the participant's proceeds unless a waiver is executed by the spouse. No such waiver was executed.

Furthermore, under the deemed beneficiary provisions in paragraph 2 of Article IX of both the MPP Plan and the Retirement Plan, the surviving spouse is the deemed beneficiary as evidenced by the order of priority set out in the provision. *See* IRS Letter Ruling 9008003 (November 13, 1989).

Accordingly, all proceeds from the Plans are properly payable to defendant Beverlie P. Crawford, as decedent's surviving spouse.

Plaintiffs' motion for summary judgment is DENIED. Defendants' motion for summary judgment is GRANTED.

Appendix E

The clerk is directed to enter declaratory judgment dismissing the case in favor of the defendants.

ENTER: This 15th day of December, 1993.

s/ Robert M. McRae
ROBERT M. MCRAE
SENIOR UNITED STATES
DISTRICT JUDGE

CERTIFIED TRUE COPY
ROBERT R. DI TROLIO, CLERK
s/ V. La Fon